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**IN THE  
COURT OF APPEALS OF INDIANA**

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MARCY JASMUND CHERRY,

Appellant-Petitioner,

vs.

JOHN CHERRY III,

Appellee-Respondent.

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No. 79A04-0707-CV-392

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APPEAL FROM THE TIPPECANOE SUPERIOR COURT  
The Honorable Donald L. Daniel, Judge  
Cause No. 79C01-0605-DR-121

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**June 9, 2008**

**MEMORANDUM OPINION – NOT FOR PUBLICATION**

**KIRSCH, Judge**

Marcy Jasmund Cherry (“Wife”) appeals the trial court’s division of marital property

in her dissolution with John Cherry III (“Husband”). Wife raises several issues that we consolidate and restate as: whether the trial court abused its discretion in dividing the marital property.

We affirm in part, reverse in part, and remand with instructions.

### **FACTS AND PROCEDURAL HISTORY**

Husband and Wife were married in May of 2004. Each had a child prior to their marriage. Wife petitioned for dissolution in May of 2006. From the beginning, the parties’ marriage was a financial disaster. They purchased a home with a substantial down payment but with limited income and several outstanding debts. They then took out a home equity line of credit that depleted the equity in the home and compounded the parties’ debt. They purchased a vehicle and took on other debt they could not afford. Husband started a bicycle business that further consumed the parties’ credit and never turned a profit. Husband also failed to stay current on his child support obligation.

At the time the parties married, Husband had \$62,000.00 from a previous marriage settlement; this money was used to pay for Wife’s vehicle that had been repossessed and needed repair, Wife’s other personal and business debts, and the parties’ living expenses. Husband had \$3,000.00 in the bank, his two vehicles, and his household goods and furnishings. At the time of their marriage, Husband’s parents gave him \$63,000.00. Husband was employed part-time, earned \$7,788.60 in 2004 and \$14,627.54 in 2006, and reported no earnings in 2005. During the marriage, Husband operated a bicycle repair business out of the parties’ residence. The business lost \$10,134.00 in 2004 and \$13,579.00 in 2005. Husband did not have any earnings from this business in 2005.

Wife brought to the marriage her vehicle and her household goods and furnishings. Wife was employed full-time and made \$23,908.21 in 2004 and \$24,983.00 in 2005. Wife had a retirement fund through Franklin Templeton (\$1,433.00), an H & R block IRA (\$299.85), a TIAA-CREF account (\$830.00), and a PERF account (\$4,848.00). Wife also had a life insurance policy with a cash value of \$144.58. The parties had three vehicles (worth \$6,000.00, \$1,000.00, and \$1,000.00).

In July 2004, the parties purchased a residence for \$160,000.00 in Battle Ground, Indiana. For the down payment, the parties used \$53,411.77 of the \$63,000.00 Husband's parents had given him and financed \$110,000.00 through a mortgage on the property. Wife paid a monthly mortgage payment of \$920.00 from August 2004 to June 2006. In 2005, the parties took out a home equity line of credit on the residence (\$18,000.00) and used \$10,863.41 of the line of credit to purchase Wife a Volvo. As of the date of the separation in 2006, Wife deposited the parties' 2005 tax refund of approximately \$4,000.00 into her personal checking account. Wife later transferred the \$4,000.00 to her daughter's personal checking account. A little over two months after Wife petitioned for dissolution, her daughter transferred back \$2,300.00 to Wife's personal checking account. Wife also used \$675.00 from her daughter's account to pay for homeowner's insurance on her new residence in West Lafayette. Two weeks later, Wife used \$1,297.25 of her daughter's checking account to pay for the West Lafayette residence's closing costs and other expenses.

During the course of their marriage, the parties acquired several debts, which included the remaining balances on the mortgage and the equity line of credit. They also had a business credit card that had a \$3,938.90 balance, a Lowe's credit card with a balance of

\$4,658.57, and another credit card with a \$2,374.00 balance. Wife had \$7,351.00 in student loan debt, and Husband had an outstanding child support arrearage of \$3,949.12. At the time of separation, the parties had equity in the real estate of approximately \$36,000, other assets (including the 2005 tax refund) worth \$18,100 and non-real estate debts totaling \$33,173.52.

The trial court awarded the real estate subject to the two mortgages (net value of \$36,975) and two of the vehicles (net value \$7,000) to Husband. It awarded Wife the retirement and life insurance accounts (valued at \$7,100) and the tax refund (valued at \$4,000). It divided the non-real estate debts between Husband (\$25,823) and Wife (\$7,351). It also ordered Wife to pay Husband \$9,235.76 as a money judgment. Thus, the net distribution to Husband was \$27,407 or 125% of the net marital estate. The distribution to Wife was a negative \$5,506. Wife now appeals.

### **DISCUSSION AND DECISION**

The division of marital assets lies within the sound discretion of the trial court, and we will reverse only for an abuse of that discretion. *J.M. v. N.M.*, 844 N.E.2d 590, 602 (Ind. Ct. App. 2006), *trans. denied* (citing *Woods v. Woods*, 788 N.E.2d 897, 900 (Ind. Ct. App. 2003)). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances presented. *Id.* (citing *Daugherty v. Daugherty*, 816 N.E.2d 1180, 1187 (Ind. Ct. App. 2004)). The trial court shall presume that an equal division of the marital estate between the parties is just and reasonable. IC 31-15-7-5. It may deviate from the statutory presumption of equal distribution if a party presents relevant evidence to rebut the presumption. Relevant evidence includes evidence of: (1) each spouse's contribution to the acquisition of property; (2) acquisition of property through gift

or inheritance prior to the marriage; (3) the economic circumstances of each spouse at the time of disposition; (4) each spouse's dissipation or disposition of property during the marriage; and (5) each spouse's earning ability. IC 31-15-7-5; *Chase v. Chase*, 690 N.E.2d 753, 756 (Ind. Ct. App. 1998).

The trial court found Husband rebutted the presumptive equal division of marital property. In reaching its decision, the trial court took into account the contribution of Husband's assets accumulated prior to the marriage some of which was used to pay Wife's past debts, Husband's parent's gift of \$63,000.00 used to purchase as a down payment on the marital residence, and Wife's actions regarding the 2005 tax refund.

Although a trial court may deviate from the fifty-fifty presumption, under no circumstances may it set aside to one party more assets than exist in the marital estate. *In re Marriage of Lay*, 512 N.E.2d 1120, 1123-24 (Ind. Ct. App. 1987) (the trial court is required to divide assets and liabilities in which there is vested present interest). Doing so would be an impermissible maintenance award. *See Roberts v. Roberts*, 670 N.E.2d 72, 75 (Ind. Ct. App. 1996) (citing *Wilcox v. Wilcox*, 365 N.E.2d 792 (Ind. Ct. App. 1977) ("any award over and above the assets of the marriage must represent some form of maintenance.")). Here, the trial court abused its discretion by entering a property division that exceeds the net value of the marital estate.

We affirm the trial court's determination that an unequal division of the marital property in favor of husband is "just and reasonable." On remand, we instruct the trial court

to enter an order declaring a seventy-five/twenty-five split of the marital estate<sup>1</sup> as follows: Husband shall have the marital residence and the Volvo subject to the liabilities thereon. Wife shall have the parties' 2005 tax refund and her retirement accounts and life insurance policy. Further, Wife shall be awarded all of her family's heirlooms. Wife shall pay and hold Husband harmless on her student loans. Husband shall pay and hold Wife harmless on the remainder of all the parties' outstanding debts. In order to reach a seventy-five/twenty-five split, Wife shall be awarded a \$3,086.00 money judgment against Husband as a lien on the marital residence. The trial court's decree shall remain in effect in all other respects, including the orders for Wife to transfer to Husband her interests in the house and Volvo, if she has not done so already.

Affirmed, reversed, and remanded with instructions.

MAY, J., concurs in result without separate opinion.

RILEY, J., dissents with separate opinion.

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<sup>1</sup> In ordering the division of assets and liabilities, we are not insensitive to the fact that such a determination is ordinarily left to the trial court's discretion. We order the division here in the interests of judicial economy and economy to the parties who have limited financial means.

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**Judge, Riley, dissenting with separate opinion.**

I respectfully dissent. I find that the trial court made an unequal division of the marital property that is “just and reasonable.” I disagree with the majority opinion that finds the net distribution to Husband was 125% of the marital estate. The trial court has carefully considered the assets and debt and has divided the marital estate pursuant to the provisions of I.C. § 31-15-7-5. I find there is no abuse of discretion and would affirm the trial court.